

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

DAVID LEE HARMON,

Plaintiff,

v.

Case No.: 2:20-cv-293-FtM-38NPM

VENICE TOYOTA,

Defendant.

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OPINION AND ORDER¹

Plaintiff is incarcerated in Charlotte County Jail and filed a *pro se* Complaint for Violation of Civil Rights under [42 U.S.C. § 1983](#) on April 22, 2020. ([Doc. 1](#)). Harmon seeks to proceed *in forma pauperis* on his Complaint ([Doc. 4](#)). Because the Court finds the Complaint subject to dismissal without prejudice under [28 U.S.C. § 1915A](#), the Court will not grant Plaintiff *in forma pauperis* status nor assess the \$350.00 filing fee under [28 U.S.C. § 1915\(b\)\(1\)](#).

Harmon's status as a prisoner² seeking to proceed *in forma pauperis* mandates the Court to conduct a frivolity screening to determine whether the Complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted; or, alternatively "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(a)-(b)(requiring court to review "before docketing, if feasible" a prisoner complaint

¹ Disclaimer: Documents hyperlinked to CM/ECF are subject to PACER fees. By using hyperlinks, the Court does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide, nor does it have any agreements with them. The Court is also not responsible for a hyperlink's availability and functionality, and a failed hyperlink does not affect this Order.

² Harmon states he is pretrial detainee. ([Doc. 1 at 4](#)). Regardless, Harmon is considered a prisoner for purposes of review under [28 U.S.C. § 1915A](#), as the term includes "any persons incarcerated or detained in any facility who is accused of . . . violations of criminal law" *Id.* [§ 1915A\(c\)](#).

and identify cognizable claims or dismiss the complaint); see also 28 U.S.C. § 1915(e)(2)(permitting court to dismiss a case at any time notwithstanding that any filing fee has been paid). The phrase “fails to state a claim upon which relief may be granted” has the same meaning as the nearly identical phrase in [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). See [Leal v. Ga. Dep’t of Corr.](#), 254 F.3d 1276, 1278-79 (11th Cir. 2001)(per curiam). While a complaint need not provide detailed factual allegations, there “must be enough to raise a right to relief above the speculative level,” and the complaint must contain enough facts to state a claim that is “plausible on its face.” [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 555–56 (2007). In making the above determinations, all factual allegations in the complaint must be liberally construed and accepted as true. [Leib v. Hillsborough Cty. Pub. Transp. Comm’n.](#), 558 F.3d 1301, 1305 (11th Cir. 2009).

To state a § 1983 claim, a plaintiff must allege that (1) the defendant deprived him of a right secured under the Constitution or federal law, and (2) the deprivation occurred under color of state law. [Bingham v. Thomas](#), 654 F.3d 1171, 1175 (11th Cir. 2011) (citing [Arrington v. Cobb County](#), 139 F.3d 865, 872 (11th Cir. 1998)). In addition, a plaintiff must allege and establish an affirmative causal connection between the defendant’s conduct and the constitutional deprivation. [Marsh v. Butler County, Ala.](#), 268 F.3d 1014, 1059 (11th Cir. 2001).

According to the Complaint, Harmon fell asleep while driving his 2015 Toyota Highlander due to “carbon dioxide/monoxide” that came from “a leaky exhaust” causing “a no-fault accident” and significant personal injuries to Harmon. ([Doc. 1 at 5](#)). The Complaint names Venice Toyota, the entity that serviced the vehicle in March 2019

shortly before the accident, as the sole defendant.³ (*Id.* at 4). Harmon seeks damages and a new vehicle for his injuries due to the negligence of Venice Toyota in servicing his vehicle. ([Doc. 1](#) at 3, 5).

The Complaint fails to meet either prong under § 1983. The Complaint does not allege a violation of any constitutional right. Further, Venice Toyota is a private business and is not considered a person acting under color of state law for § 1983. See [Rayburn v. Hogue](#), 241 F.3d 1341, 1347 (11th Cir. 2001). In rare circumstances, a private party may be considered a state actor for § 1983. [Harvey v. Harvey](#), 949 F.2d 1127, 1130 (11th Cir. 1992); see also [Lugar v. Edmondson Oil Co.](#), 457 U.S. 922, 938-39 (1982). The Complaint alleges no facts to deem Venice Toyota a state actor, nor can the Court conceive such facts can be alleged. See [Rayburn](#), 241 F.3d at 1347. The Court finds the case must be dismissed under 28 U.S.C. § 1915A because the Complaint fails to allege either a violation of a constitutional right under § 1983 and the sole defendant is not a state actor.

In certain circumstances, a *pro se* litigant must be given an opportunity to amend his complaint. See [Brown v. Johnson](#), 387 F.3d 1344, 1349 (11th Cir. 2004) (finding “[b]ecause [plaintiff] filed his motion to amend before the district court dismissed his complaint and before any responsive pleadings were filed, [plaintiff] had the right to amend his complaint under Rule 15(a).”); see also [Trovillo v. Venz](#), 303 F.3d 1256, 1260 (finding “no error” in district court’s *sua sponte* dismissal but because plaintiff requested

³ According to the Florida Department of State, Venice Toyota is a fictitious name and is owned by Venice Motor, LLC, a Florida Limited Liability Company with their business address at 2925 Mall Hill Drive, Lakeland, Florida 33810. dos.myflorida.com/sunbiz/search. Consequently, alternatively there is no diversity to invoke this Court’s jurisdiction. Further, Harmon filed a complaint against Toyota of North America in a separate action. See case no. 2:20-cv-252-FtM-38-NPM.

leave to amend before dismissal court should have granted leave); *Bryant v. Dupree*, 252 F.3d 1161, 1163-64 (11th Cir. 2001) (finding district court's denial of motion to amend in response to motion to dismiss improper). Plaintiff does not seek to amend his complaint and the Court finds any amendments against the named defendant under the facts would be futile. *Bryant*, 252 F.3d at 1163.

Assuming Harmon has a viable state common law claim against Venice Toyota, the Court declines to exercise supplemental jurisdiction over this claim and dismisses any state law claims without prejudice. 28 U.S.C. §1367(c). Harmon may pursue his state court claims in state court, if appropriate.

Accordingly, it is hereby **ORDERED**:

1. Plaintiff's Complaint for Violation of Civil Rights ([Doc. 1](#)) is **DISMISSED with prejudice under 28 U.S.C. § 1915A(b)(1)**.
2. The Court dismisses **without prejudice** any state law claims.
3. The **Clerk** shall enter judgment, terminate any pending motions as moot and close this file.

DONE and **ORDERED** in Fort Myers, Florida this 15th day of May, 2020.


SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

SA: FTMP-1
Copies: All Parties of Record